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No. 190

In the Supreme Court of the United States

October Term, 1961

United States, petitioner

v.

Thomas Crawley Davis, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

I

THE MARITAL OBLIGATIONS DISCHARGED IN THE "MESTA" AND "HALLIWELL" CASES WERE OF THE SAME NATURE AS THOSE INVOLVED IN THE INSTANT CASE

Taxpayer argues (Br. 14–16) that *Commissioner* v. *Mesta,* 123 F. 2d 986 (C.A. 3d), certiorari denied, 316 U.S. 695, and *Commissioner* v. *Halliwell,* 131 F. 2d 642 (C.A. 2d), certiorari denied, 319 U.S. 741, are not authorities in point on the ground that there the transfers were made in discharge of obligations to support and were not transfers by way of division of common property of the spouses, which taxpayer asserts is the case here. Both facets of this contention seem to us incorrect.

In *Mesta* and *Halliwell* the transfers were not merely in consideration of discharge of support rights but of discharge of all marital rights against the respective husbands' property. Thus, in *Mesta,* 42 B.T.A. 933, 934–935:

> the delivery of the securities and property mentioned above by him was "in full settlement and satisfaction of all claims and demands on the part of Mrs. Mesta for her maintenance and support, and in lieu of all rights which she may now have, or hereafter acquire, against the property of Mr. Mesta, as wife, widow, or in any manner arising out of or resulting from the relationship of husband and wife * * *." She also released Mesta, his heirs, executors, administrators and assigns, from all claims for support and maintenance and from all rights, interests, claims, demands or preferences in or against him or his estate that she might have as wife, widow, or otherwise.

Again in *Halliwell* the parties agreed that if the husband died pending the divorce action, the securities and cash specified in the agreement were to be delivered to the wife "in lieu of any and all statutory and other rights in and to petitioner's estate." Additionally the wife "executed a release in which she released petitioners, his executors, administrators, and estate from all of her rights to share in his property at his death." (44 B.T.A. 740, 743.)

Moreover, in the present case all of the transfers were made in consideration for the release of all rights she had against him both by way of support

and as against any of his property.[1] As the Court below found, all of the property involved in the property settlement agreement was owned by Mr. Davis (R. 115) and as discussed in our main brief (pp. 22–23) under Delaware law, with the possible exception of dower, the wife had no property interest in any of the property owned by the husband. She could not have prevented him, for example, from selling the duPont stock, and she had no specific right in any of his property. While the agreement purports to make "division" (R. 93) of certain items of property including the stock and impose certain other obligations on him for her maintenance and support, use of the word "division" in the agreement is a legal misnomer. The term does not describe what transpired under the Delaware law except in a loose, figurative and nonlegal sense. The wife had no property involved in the settlement agreement which she could divide with him; on the contrary, as the Court found,

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[1] Paragraph 13 of the settlement agreement (R. 97) reads as follows:

> 13. The parties hereto and each of them covenant that this agreement is and shall be a complete and final settlement of all claims of every nature and kind between them. Upon performance of husband's covenants and undertakings under this agreement, the wife hereby waives, releases and relinquishes unto the husband all rights that she might otherwise have to any of the property of the husband and to any claim for support or maintenance for herself and their minor child, and that she will not incur or contract any debt or obligation on the husband's credit and that she will keep the husband and his estate indemnified against and from all debts and liabilities to be contracted or incurred by her with all actions, proceedings, claims and demands, costs, damages and expenses whatsoever in respect to such liabilities or any of them.

all of the property involved was owned by him. Indeed, property settlements and continuing periodical payments are but alternative methods of settling the same obligations arising from the marital relationship. This is illustrated in the present agreement by the provision that "for her maintenance and support" (R. 95) he agrees to pay her a sum of money equivalent to the dividend paid to holders of duPont stock during the period before he shall have transferred the entire 1,000 shares to her. Similarly, the stock and its dividends, once he did transfer it to her, represented satisfaction *pro tanto* of the same obligation and indeed of all obligations arising from the marital relationship.

Finally, the court below clearly considered *Mesta* and *Halliwell* as authorities in point, although it refused to follow them.[2] (R. 108–109.)

II

THE GOVERNMENT IS NOT INTRODUCING A DIVERGENCE IN THE TAX LAWS BETWEEN COMMON-LAW AND COMMUNITY-PROPERTY JURISDICTIONS

Taxpayer argues that the Government is asking the Court "to introduce into the tax laws a serious divergence of treatment" (Br. 9) between common-law and community-property jurisdictions. Such diver-

[2] Thus, the opinion below states (R. 108–109):

The result is that we are faced with two precedents pointing in opposite directions and an attempt to distinguish the two is impossible.

Since there is no clear ground for distinguishment between the rule of the *Mesta-Halliwell* cases and the *Marshman* case, it behooves us to decide which rule is the correct one in the premises. * * *

gencies have long existed, however, and are the product simply of the different "property" rights created by the laws of the several states. If it is thought to be undesirable to have tax consequences turn upon such differences, the remedy lies with Congress, and not with the courts. Congress has in fact acted to remove some of the divergencies in tax consequences between common-law and community-property states, but it has by no means removed all of them.[3] Among the areas in which Congress has been content to allow tax consequences to turn upon state law is that of property transfers incident to a divorce, for although the rule objected to by the taxpayer was adopted in the *Mesta* and *Halliwell* cases over twenty years ago, Congress has not seen fit to change it. That the results here, as in many other areas of the tax law, may turn upon differences of property law among the

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[3] Although Congress removed one of the most basic discrepancies by permitting spouses in common-law states to file joint returns with "income-splitting" for tax computation purposes, there remain, even in the limited area of the treatment of current items of income and expenses, substantial additional benefits available to taxpayers in community-property states. Because of the wife's "ownership" of one-half of the community income, community-property spouses need not file joint returns to gain the benefits of income-splitting and are therefore free to file separate returns when it is advantageous to do so—*e.g.*, to avoid joint liability; to permit deduction of capital losses up to $2,000 rather than $1,000 (Section 1211); or to lower the amount (3% of adjusted gross income) which medical expenses must exceed to be deductible (Section 213). Other benefits that would not be available in a common-law state if the husband owned all the income include, for example, a maximum dividend exclusion of $100 rather than $50 (Section 116) and a maximum retirement income credit of $480 rather than $240 (Section 37).

several states is not, by itself, a sufficient reason for this Court to reject those long-standing decisions.

III

IF THERE WAS A TAXABLE EXCHANGE, THE CONSIDERATION RECEIVED SHOULD BE MEASURED BY THE VALUE OF THE STOCK ON THE DATE OF THE TRANSFER

Taxpayer in his brief here makes two contentions, not raised below, bearing upon the measure of the consideration which he received for the duPont stock transferred in March 1955.

First, he urges (Br. 21–22) that, if the market value of the duPont stock is to be accepted as the equivalent of the rights released by his wife, the relevant value is its market value on the date of the agreement (November 1954) and not, as the Government claims, the date when the stock was transferred to Mrs. Davis (March 21, 1955). He states that the market value in November 1954 was below his basis for the stock and concludes that he therefore suffered a loss, not a gain, from the transaction. That this is a wholly new argument in this Court is shown by the absence from the record of any proof of the market value of the stock in November 1954.

Superficially, it might be possible to follow the equivalence of value rationale the further step and say that, since the parties here could not know the future price of duPont stock, the value they assigned to the marital rights should be the value on the day they signed the agreement. In this instance as in others, however, we suggest that any rationale developed should provide, above all else, a workable and

understandable rule consistent with the main body of tax law. Tax solutions, like the Law Merchant, should, when possible, contribute to ease of administration by taxpayers and the Government.

In all other cases under the Internal Revenue Code when a taxable exchange actually takes place on a given date, the property given up and the property received are valued on that date, even though the exchange may be pursuant to an earlier binding agreement. The date of exchange was used in the *Mesta* and *Halliwell* cases,[4] and was not contested by the parties. The Commissioner's selection of that date was similarly not contested below by the taxpayer in this case.

The administrative necessity for that rule can be seen by a more common example of an instance where the value of the property received is measured by the property given up. If, in a taxable exchange, a

[4] In *Mesta* (123 F. 2d 986, 42 B.T.A. 933) the property settlement agreement was signed by the husband on March 22, 1935, and by the wife on April 13, 1935. The husband agreed to deliver 5,200 shares of stock and certain personal property. The contract contained provisions whereby the parties would respectively release and discharge each other from all claims or demands. On April 17, 1935, the husband delivered the stock. The court took the fair market value of the stock on the date of the transfer ($156,975) less the cost ($7,574) as the measure of the husband's gain.

In *Halliwell* (131 F. 2d 642, 44 B.T.A. 740), the parties agreed to a property settlement on March 16, 1938, on which date the wife executed a release of the husband's marital obligations. The property (securities) was transferred on July 16, 1938. Although it appears from the Board of Tax Appeals' opinion that the value of the securities was the same on both dates (44 B.T.A. at 743–744), making the question unimportant, the court of appeals in terms referred to the value on the date of delivery as controlling (131 F. 2d at 643).

taxpayer corporation exchanges stock listed on a national exchange for stock in a closely held corporation for which there is no established market price, all would agree that the gain to the taxpayer may be measured by the value of the stock given up. Yet it has never been suggested heretofore that any value other than that on the closing date should be used. Nor would any other date be feasible in such intercorporate exchanges. If the date of "agreement" were to be used, there would usually remain questions in varying factual situations as to whether the date of "agreement" was the date of the initial agreement of the negotiators, the date it was approved by the directors, the date it was approved by the shareholders, the date on which a regulatory agency approved the proposed exchange, the date a favorable tax ruling upon which the exchange was contingent was received, *etc.* Much the same problem exists in the case of a marital settlement where the property understanding is quickly reached but dispute over custody of the children, formal divorce proceedings or some other important, but not necessarily financial, consideration makes it difficult to pin down the precise date of final agreement. Since the date of exchange is readily ascertainable without any confusion between formal and actual agreement and has been fixed by the parties themselves for the mutual transfer of equivalent obligations, it should be the determinative date for valuation of the properties exchanged. Such a solution, giving to the time of physical delivery and receipt prime significance in measuring rights and

liabilities, has the virtue of simplicity and precision which no alternative solution would afford.

The second contention raised by taxpayer for the first time on brief here (p. 22) is the "intriguing and serious question as to when this consideration was received." Suggestion is made that the consideration is received not in the year of transfer (1955) but rather in 1954 (the year of agreement), in 1956 (the year of the second transfer of 500 shares of duPont stock), or in 1964 (when the last of the periodic payments is to be made).

Again resort must be had to a workable rule. The gain could not have been taxed in 1954 since the shares which would be used to fulfill the obligation were not yet identified. The selection of 1956 would also result in a bunching of income in one year. The selection of 1964 would cause an unreasonable postponement since Mr. Davis will have had the full benefit of the release from marital obligations for many years prior thereto.

The ratable realization of gain accomplished by matching the income received with the property surrendered is a necessary corollary to the rule of equivalence of value. Moreover it comports with the reality of the situation. Petitioner could have sold these shares for some $7,500 more than they cost him. Instead he used the shares to satisfy his obligation to his wife. Since he received the benefit of conferring the full fair market value on her in 1955, he

should be taxed in that year rather than in a later year when he has disposed of another lot of stock.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

Nos. 190 and 268.—October Term, 1961.

United States, Petitioner, 190 *v.* Thomas Crawley Davis et al. Thomas Crawley Davis et al., Petitioners, 268 *v.* United States.	On Writs of Certiorari to the United States Court of Claims.

[June 4, 1962.]

Mr. Justice Clark delivered the opinion of the Court.

These cases involve the tax consequences of a transfer of appreciated property by Thomas Crawley Davis [1] to his former wife pursuant to a property settlement agreement executed prior to divorce, as well as the deductibility of his payment of her legal expenses in connection therewith. The Court of Claims upset the Commissioner's determination that there was taxable gain on the transfer but upheld his ruling that the fees paid the wife's attorney were not deductible. 287 F. 2d 168. We granted certiorari on a conflict in the Courts of Appeals and the Court of Claims on the taxability of such transfers.[2] 368 U. S. 813. We have decided that the taxpayer did have a taxable gain on the transfer and that the wife's attorney's fees were not deductible.

In 1954 the taxpayer and his then wife made a voluntary property settlement and separation agreement calling

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[1] Davis' present wife, Grace Ethel Davis, is also a party to these proceedings because a joint return was filed in the tax year in question.

[2] The holding in the instant case is in accord with *Commissioner* v. *Marshman,* 279 F. 2d 27 (C. A. 6th Cir. 1960), but is contra to the holdings in *Commissioner* v. *Halliwell,* 131 F. 2d 642 (C. A. 2d Cir. 1942), and *Commissioner* v. *Mesta,* 123 F. 2d 986 (C. A. 3d Cir. 1941).

for support payments to the wife and minor child in addition to the transfer of certain personal property to the wife. Under Delaware law all the property transferred was that of the taxpayer, subject to certain statutory marital rights of the wife including a right of intestate succession and a right upon divorce to a share of the husband's property.[3] Specifically as a "division in settlement of their property" the taxpayer agreed to transfer to his wife, *inter alia,* 1,000 shares of stock in the E. I. du Pont de Nemours & Co. The then Mrs. Davis agreed to accept this division "in full settlement and satisfaction of any and all claims and rights against the husband whatsoever (including but not by way of limitation, dower and all rights under the laws of testacy and intestacy) . . . ." Pursuant to the above agreement which had been incorporated into the divorced decree, one-half of this stock was delivered in the tax year involved, 1955, and the balance thereafter. Respondent's cost basis for the 1955 transfer was $74,775.37, and the fair market value of the 500 shares there transferred was $82,250. The taxpayer also agreed orally to pay the wife's legal expenses, and in 1955 he made payments to the wife's attorney, including $2,500 for services concerning tax matters relative to the property settlement.

I.

The determination of the income tax consequences of the stock transfer described above is basically a two-step analysis: (1) Was the transaction a taxable event? (2) If so, how much taxable gain resulted therefrom? Originally the Tax Court (at that time the Board of Tax Appeals) held that the accretion to property transferred pursuant to a divorce settlement could not be taxed as capital gain to the transferor because the amount realized

[3] 12 Del. Code Ann. (Supp. 1960) § 512; 13 Del. Code Ann. § 1531. In the case of realty, the wife in addition to the above has rights of dower. 12 Del. Code Ann. §§ 502, 901, 904, 905.

by the satisfaction of the husband's marital obligations was indeterminable and because, even if such benefit were ascertainable, the transaction was a nontaxable division of property. *Mesta* v. *Commissioner,* 42 B. T. A. 933 (1940); *Halliwell* v. *Commissioner,* 44 B. T. A. 740 (1941). However, upon being reversed in quick succession by the Courts of Appeals of the Third and Second Circuits, *Commissioner* v. *Mesta,* 123 F. 2d 986 (C. A. 3d Cir. 1941); *Commissioner* v. *Halliwell,* 131 F. 2d 642 (C. A. 2d Cir. 1942), the Tax Court accepted the position of these courts and has continued to apply these views in appropriate cases since that time. *Hall* v. *Commissioner,* 9 T. C. 53 (1947); *Patino* v. *Commissioner,* 13 T. C. 816 (1949); *Estate of Stouffer,* 30 T. C. 1244 (1958); *King* v. *Commissioner,* 31 T. C. 108 (1958); *Marshman* v. *Commissioner,* 31 T. C. 269 (1958). In *Mesta* and *Halliwell* the Courts of Appeals reasoned that the accretion to the property was "realized" by the transfer and that this gain could be measured on the assumption that the relinquished marital rights were equal in value to the property transferred. The matter was considered settled until the Court of Appeals for the Sixth Circuit, in reversing the Tax Court, ruled that, although such a transfer might be a taxable event, the gain realized thereby could not be determined because of the impossibility of evaluating the fair market value of the wife's marital rights. *Commissioner* v. *Marshman,* 279 F. 2d 27 (1960). In so holding that court specifically rejected the argument that these rights could be presumed to be equal in value to the property transferred for their release. This is essentially the position taken by the Court of Claims in the instant case.

II.

We now turn to the threshold question of whether the transfer in issue was an appropriate occasion for taxing the accretion to the stock. There can be no doubt

that Congress, as evidenced by its inclusive definition of income subject to taxation, *i. e.*, "all income from whatever source derived, including . . . [g]ains derived from dealings in property," [4] intended that the economic growth of this stock be taxed. The problem confronting us is simply *when* is such accretion to be taxed. Should the economic gain be presently assessed against taxpayer, or should this assessment await a subsequent transfer of the property by the wife? The controlling statutory language, which provides that gains from dealings in property are to be taxed upon "sale or other disposition," [5] is too general to include or exclude conclusively the transaction presently in issue. Recognizing this, the Government and the taxpayer argue by analogy from transactions more easily classified as within or without the ambient of taxable events. The taxpayer asserts that the present disposition is comparable to a nontaxable division of property between two co-owners,[6] while the

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[4] Internal Revenue Code of 1954 § 61 (a).

[5] Internal Revenue Code of 1954 §§ 1001, 1002.

[6] Any suggestion that the transaction in question was a gift is completely unrealistic. Property transferred pursuant to a negotiated settlement in return for the release of admittedly valuable rights is not a gift in any sense of the term. To intimate that there was a gift to the extent the value of the property exceeded that of the rights released not only invokes the erroneous premise that every exchange not precisely equal involves a gift but merely raises the measurement problem discussed in Part III, *infra*, p. —. Cases in which this Court has held transfers of property in exchange for the release of marital rights subject to gift taxes are based not on the premise that such transactions are inherently gifts but on the concept that in the contemplation of the gift tax statute they are to be taxed as gifts. *Merrill* v. *Fahs*, 324 U. S. 308 (1945); *Commissioner* v. *Wemyss*, 324 U. S. 303 (1945); see *Harris* v. *Commissioner*, 340 U. S. 106 (1950). In interpreting the particular income tax provisions here involved, we find ourselves unfettered by the language and considerations ingrained in the gift and estate tax statutes. See *Farid-Es-Sultaneh* v. *Commissioner*, 160 F. 2d 812 (C. A. 2d Cir. 1947).

Government contends it more resembles a taxable transfer of property in exchange for the release of an independent legal obligation. Neither disputes the validity of the other's starting point.

In support of his analogy the taxpayer argues that to draw a distinction between a wife's interest in the property of her husband in a common-law jurisdiction such as Delaware and the property interest of a wife in a typical community property jurisdiction would commit a double sin; for such differentiation would depend upon "elusive and subtle casuistries which . . . possess no relevance for tax purposes," *Helvering* v. *Hallock,* 309 U. S. 106, 118 (1940), and would create disparities between common-law and community property jurisdictions in contradiction to Congress' general policy of equality between the two. The taxpayer's analogy, however, stumbles on its own premise, for the inchoate rights granted a wife in her husband's property by the Delaware law do not even remotely reach the dignity of co-ownership. The wife has no interest—passive or active—over the management or disposition of her husband's personal property. Her rights are not descendable, and she must survive him to share in his intestate estate. Upon dissolution of the marriage she shares in the property only to such extent as the court deems "reasonable." 13 Del. Code Ann. § 1531 (a). What is "reasonable" might be ascertained independent of the extent of the husband's property by such criteria as the wife's financial condition, her needs in relation to her accustomed station in life, her age and health, the number of children and their ages, and the earning capacity of the husband. See, *e. g., Beres* v. *Beres,* 52 Del. 133, 154 A. 2d 384 (1959).

This is not to say it would be completely illogical to consider the shearing off of the wife's rights in her husband's property as a division of that property, but we believe the contrary to be the more reasonable construc-

tion. Regardless of the tags, Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof. In the present context the rights of succession and reasonable share do not differ significantly from the husband's obligations of support and alimony. They all partake more of a personal liability to the husband than a property interest of the wife. The effectuation of these marital rights may ultimately result in the ownership of some of the husband's property as it did here, but certainly this happenstance does not equate the transaction with a division of property by co-owners. Although admittedly such a view may permit different tax treatment among the several States, this Court in the past has not ignored the differing effects on the federal taxing scheme of substantive differences between community property and common-law systems. *E. g., Poe* v. *Seaborn*, 282 U. S. 101 (1930). To be sure Congress has seen fit to alleviate this disparity in many areas, *e. g.*, Revenue Act of 1948, 62 Stat. 110, but in other areas the facts of life are still with us.

Our interpretation of the general statutory language is fortified by the long-standing administrative practice as sounded and formalized by the settled state of law in the lower courts. The Commissioner's position was adopted in the early 40's by the Second and Third Circuits and by 1947 the Tax Court had acquiesced in this view. This settled rule was not disturbed by the Court of Appeals for the Sixth Circuit in 1960 or the Court of Claims in the instant case, for these latter courts in holding the gain indeterminable assumed that the transaction was otherwise a taxable event. Such unanimity of views in support of a position representing a reasonable construction of an ambiguous statute will not lightly be put aside. It is quite possible that this notorious construction was relied upon by numerous taxpayers as well as the

Congress itself, which not only refrained from making any changes in the statutory language during more than a score of years but re-enacted this same language in 1954.

III.

Having determined that the transaction was a taxable event, we now turn to the point on which the Court of Claims balked, *viz.*, the measurement of the taxable gain realized by the taxpayer. The Code defines the taxable gain from the sale or disposition of property as being the "excess of amount realized therefrom over the adjusted basis . . . ." I. R. C. (1954) § 1001 (a). The "amount realized" is further defined as "the sum of any money received plus the fair market value of the property (other than money) received." I. R. C. (1954) § 1001 (b). In the instant case the "property received" was the release of the wife's inchoate marital rights. The Court of Claims, following the Court of Appeals for the Sixth Circuit, found that there was no way to compute the fair market value of these marital rights and that it was thus impossible to determine the taxable gain realized by the taxpayer. We believe this conclusion was erroneous.

It must be assumed, we think, that the parties acted at arm's length and that they judged the marital rights to be equal in value to the property for which they were exchanged. There was no evidence to the contrary here. Absent a readily ascertainable value it is accepted practice where property is exchanged to hold, as did the Court of Claims in *Philadelphia Park Amusement Co.* v. *United States*, 126 F. Supp. 184, 189 (1954), that the values "of the two properties exchanged in an arm's-length transaction are either equal in fact, or are presumed to be equal." Accord, *United States* v. *General Shoe Corp.*, 282 F. 2d 9 (C. A. 6th Cir. 1960); *International Freighting Corp.* v. *Commissioner*, 135 F. 2d 310 (C. A. 2d Cir. 1943). To be sure there is much to

be said of the argument that such an assumption is weakened by the emotion, tension and practical necessities involved in divorce negotiations and the property settlements arising therefrom. However, once it is recognized that the transfer was a taxable event, it is more consistent with the general purpose and scheme of the taxing statutes to make a rough approximation of the gain realized thereby than to ignore altogether its tax consequences. Cf. *Helvering* v. *Safe Deposit & Trust Co.*, 316 U. S. 56, 67 (1942).

Moreover, if the transaction is to be considered a taxable event as to the husband, the Court of Claims' position leaves up in the air the wife's basis for the property received. In the context of a taxable transfer by the husband,[7] all indicia point to a "cost" basis for this property in the hands of the wife.[8] Yet under the Court of Claims' position her cost for this property, *i. e.*, the value of the marital rights relinquished therefor, would be indeterminable, and on subsequent disposition of the property she might suffer inordinately over the Commissioner's assessment which she would have the burden of proving erroneous, *Commissioner* v. *Hansen*, 360 U. S. 446, 468 (1959). Our present holding that the value of these rights is ascertainable eliminates this problem; for the

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[7] Under the present administrative practice, the release of marital rights in exchange for property or other consideration is not considered a taxable event as to the wife. For a discussion of the difficulties confronting a wife under a contrary approach see Taylor and Schwartz, Tax Aspects of Marital Property Agreements, 7 Tax L. Rev. 19, 30 (1951); Comment, The Lump Sum Divorce Settlement as a Taxable Exchange, 8 U. C. L. A. L. Rev. 593, 601-602 (1961).

[8] Section 1012 of the Internal Revenue Code of 1954 provides that: "The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses)."

same calculation that determines the amount received by the husband fixes the amount given up by the wife, and this figure, *i. e.*, the market value of the property transferred by the husband, will be taken by her as her tax basis for the property received.

Finally, it must be noted that here, as well as in relation to the question of whether the event is taxable, we draw support from the prior administrative practice and judicial approval of that practice. See p. —, *supra.* We therefore conclude that the Commissioner's assessment of a taxable gain based upon the value of the stock at the date of its transfer has not been shown erroneous.[9]

IV.

The attorney-fee question is much simpler. It is the customary practice in Delaware for the husband to pay both his own and his wife's legal expenses incurred in the divorce and the property settlement. Here petitioner paid $5,000 of such fees in the taxable year 1955 earmarked for tax advice in relation to the property settlement. One-half of this sum went to the wife's attorney. The taxpayer claimed that under § 212 (3) of the 1954 Code, which allows a deduction for the "ordinary and necessary expenses paid . . . in connection with the determination, collection, or refund of any tax," he was entitled to deduct the entire $5,000. The Court of Claims allowed the $2,500 paid taxpayer's own attorney but denied the like amount paid the wife's attorney. The sole question here is the deductibility of the latter fee; the Government did not seek review of the amount taxpayer paid his own attorney, and we intimate no decision on that point. As to the deduction of the wife's fees, we read the statute, if applicable to this type of tax expense,

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[9] We do not pass on the soundness of the taxpayer's other attacks upon this determination, for these contentions were not presented to the Commissioner or the Court of Claims.

to include only the expenses of the taxpayer himself and not those of his wife. Here the fees paid her attorney do not appear to be "in connection with the determination, collection, or refund" of any tax of the taxpayer. As the Court of Claims found, the wife's attorney "considered the problems from the standpoint of his client alone. Certainly then it cannot be said that . . . [his] advice was directed to plaintiff's tax problems . . . ." 287 F. 2d, at 171. We therefore conclude, as did the Court of Claims, that those fees were not a deductible item to the taxpayer.

Reversed in part and affirmed in part.

MR. JUSTICE FRANKFURTER took no part in the decision of these cases.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.